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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

**ANDREW GRIMM,**

Plaintiff,

v.

**CITY OF PORTLAND, L. MCHENRY, F.  
EARLE, AND RETRIEVER TOWING,**

Defendants.

Case No. 3:18-CV-183-MO

DEFENDANT RETRIEVER  
TOWING'S FED. R. CIV. P.  
12(b)(6)'s MOTION TO DISMISS  
FOR FAILURE TO STATE A CLAIM  
UPON WHICH RELIEF CAN BE  
GRANTED

**ORAL ARUGMENT REQUESTED**

**LR 7.1 CERTIFICATE OF COMPLIANCE**

Pursuant to LR 7.1, counsel for Defendant Retriever Towing, which is an Oregon assumed business name of Parking Enforcement Services, Inc., an active Oregon corporation ("Retriever Towing") hereby certifies that he conferred with plaintiff, who appears *pro se*. Counsel and plaintiff have been unable to agree upon the issues raised in this motion.

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## MOTION

Pursuant to Fed. R. Civ. P. 12(b)(6), Retriever Towing moves to dismiss plaintiff's *Complaint* for failure to state a claim upon which relief can be granted. Retriever Towing further requests that the dismissal be with prejudice and without opportunity to amend. This motion is supported by Retriever Towing's memorandum of law set forth below, and the records and files herein.

## MEMORANDUM IN SUPPORT OF MOTION

### 1. Fed. R. Civ. P. 12(b)(6) Standard of Review

In reviewing a dismissal for failure to state a claim, the court accepts all factual allegations in the complaint as true and draws all reasonable inferences in favor of the plaintiff. *Oki Semiconductor Co. v. Wells Fargo Bank*, 298 F.3d 768, 772 (9th Cir.2002). *Pro se* complaints are to be construed liberally and "may be dismissed for failure to state a claim only where 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Franklin v. Murphy*, 745 F.2d 1221, 1228, 1230 (9th Cir.1984) (quoting *Haines v. Kerner*, 404 U.S. 519, 520–21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972)). "Dismissal of a *pro se* complaint without leave to amend is proper only if it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." *Schucker v. Rockwood*, 846 F.2d 1202, 1203–04 (9th Cir.1988) (internal quotation marks and citation omitted).

*Weilburg v. Shapiro*, 488 F.3d 1202, 1205 (2007). This is a "less stringent" standard than that required of pleadings by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). That standard exists because the *pro se* litigant is "[p]resumably unskilled in the law, and "is far more prone to making errors in pleading than the person who benefits from the representation of counsel." *Noll v. Carlson* 809 F.2d 1446, 1448 (1987). It must be noted, however, that while Mr. Grimm is appearing *pro se* in this proceeding, he is, nonetheless, an active member of the Washington

State Bar (WSB No. 51486).<sup>1</sup>

Based on the facts alleged in the *Complaint*, not only has plaintiff failed to state a claim upon which relief may be granted, it is also “absolutely clear” that the deficiencies alleged in plaintiff’s *Complaint* cannot be cured to state a claim upon which relief may be granted.

## **2. Plaintiff Received Due Process**

Implementing parking regulations is a valid governmental interest. Towing allows for enforcement of such regulations and deters future violators. *See Scofield v. City of Hillsborough*, 862 F.2d 759, 763-64 (9<sup>th</sup> Cir 1988) (towing of unregistered vehicles advances governmental interests of requiring registration and deters owners from violating state registration laws). *See also Lone Star Security & Video, Inc. v. City of Los Angeles*, 584 F.3d 1232 (9<sup>th</sup> Cir. 2009) (no due process violation where City towed marketing trailers illegally parked for more than 72 hours in one location without individualized prior notice because City's interests in deterring illegal practice, preventing vandalism and abating nuisance outweighed owner's interest in receiving such notice).

Notwithstanding this valid governmental interest, plaintiff claims that he was denied due process because Retriever Towing (and the City) failed to notify him that his illegally parked vehicle would be towed. Plaintiff was not denied due process because he was given adequate notice—multiple times over multiple days. In *Clement v. City of Glendale*, 518 F.3d 1090, 1096 (2008), the 9<sup>th</sup> Circuit expressly held, related to notice required prior to the towing of an illegally parked vehicle:

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<sup>1</sup> Retriever Towing asks that the Court take judicial notice of this fact. “[A] court may take judicial notice of ‘matters of public record’” in considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6) without converting the motion into a motion for summary judgment. *Lee v. City of Los Angeles*, 250 F.3d 668, 688-69 (2001) *overruled on other grounds by Galbraith v. Cnty. Of Santa Clara*, 307 F.3d 1119, 1125-26 (9<sup>th</sup> Cir. 2002) (quoting *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9<sup>th</sup> Cir. 1993)).

Our holding today dovetails with *Scofield*, where we held that there was a due process requirement that notice be given—***usually in the form of a ticket placed on a windshield***—before police could tow apparently abandoned vehicles that are otherwise legally parked.

(Emphasis added.) In this case, the police did not place “***a*** ticket” on plaintiff’s vehicle—they actually placed ***four*** tickets on plaintiff’s vehicle over the course of a week. Moreover, unlike the plaintiff’s car in *Clement*, the plaintiff’s car here was not otherwise legally parked.

Plaintiff’s own allegations unequivocally establish that he *was* given constitutionally adequate notice. Plaintiff alleged:

24. On December 14, 2017, Plaintiff parked his car in a public parking spot on Southwest Hall Street in downtown Portland, Oregon.

\* \* \*

27. ***Shortly before 7:00 P.M. on December 14, 2017, Portland sent a notification to Plaintiff on his iPhone via Portland’s mobile parking app, notifying Plaintiff that his parking payment was about to expire.***

28. At 7:00 P.M. on December 14, 2017, Plaintiff’s time to legally park on Hall Street expired.

\* \* \*

30. Plaintiff did not refill the parking meter.

31. ***From 7:00 P.M. on December 14, 2017, until Plaintiff’s car was towed by Portland at 9:24 A.m. on December 21, 2017, Plaintiff’s vehicle was unlawfully parked on Hall Street.***

\* \* \*

33. ***While Plaintiff’s car was unlawfully parked, Portland issued four parking citations against Plaintiff’s car for being parked in a metered zone without proper payment.***

\* \* \*

55. All materials left by Portland's offices on Plaintiff's windshield remained undisturbed until after Plaintiff's car was towed.

*Complaint*, Pp. 5-6, 8. (Emphasis added.)

In short, plaintiff (1) knew that his meter had expired and he was therefore illegally parked (as any reasonable person, let alone a member of the Washington State Bar, could only conclude) and (2) he abandoned his vehicle for the seven days *after* that notice of meter expiration was received. Plaintiff could have also easily determined that he had been cited no less than four times because, as he pleads, the citations remained "undisturbed" on the vehicle's windshield. Plaintiff simply chose not to prudently conduct his personal affairs by checking in on the car that he pled that he knew was illegally parked. Plaintiff also knew the risk that his vehicle could be towed—in fact, it appears that he was counting on it. Plaintiff also alleges in pertinent part:

17. On March 6, 2017, Plaintiff registered his car with KnowTow.

18. KnowTow is a free online service that allows governments to provide immediate and direct notice of a tow to a KnowTow user.

19. KnowTow automatically sends an immediate text, email and voicemail notification of a tow to the affected user once a government enters that user's license-plate number on KnowTow's website (knowtow.net).

20. Portland knows that by using KnowTow it can provide immediate and direct notice of tow to any KnowTow user for free.

21. Portland also knows that vehicles with KnowTow decals are registered with KnowTow.

22. Plaintiff's car conspicuously displays KnowTow decals near its front and back license plates.

*Complaint*, P. 4. There is no reasonable inference that can be drawn other than plaintiff was aware of the risk of a tow and that vehicles parked in metered spaces after expiration of the meter

were subject to being towed. After all, plaintiff admits to subscribing to a service he believed the City was required to utilize to notify him of the tow. That conclusion, however, was misplaced as it is not supported by any authority and is contrary to *Clements* which expressly held that a parking citation *is* constitutionally adequate notice. Plaintiff's conclusion is also contrary to the U.S. Supreme Court position that "(d)ue process of law \* \* \* does not require the state to adopt any particular form of procedure, so long as it appears the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution." *Garland v. State of Washington*, 232 U.S. 642, 645 (1914).

### 3. Conclusion

Respectfully, reasonable people generally know (and members of the Washington State Bar should certainly know) that illegally parking a car will result in a citation and that an illegally parked car on a downtown city street, left over a period of seven days, will likely result in being towed without notice other than a parking citation. Plaintiff admits that he knew that his car was illegally parked within hours of parking it. As a result, the City issued four citations over the course of seven days before contacting Retriever Towing. Plaintiff received notice sufficient under the 14<sup>th</sup> Amendment and the *Complaint* confirms this. Because he has admitted, and therefore cannot now deny, these threshold facts, plaintiff cannot amend his pleading to establish a claim under the 14<sup>th</sup> Amendment. Accordingly, Retriever respectfully requests this Court to dismiss the *Complaint* with prejudice.

Dated this 21<sup>st</sup> day of February, 2018.

JORDAN RAMIS PC

By: s/ Matthew D. Lowe

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**Attorneys for Defendant Retriever  
Towing**

### CERTIFICATE OF SERVICE

I hereby certify that on the date shown below, I served a true and correct copy of the foregoing DEFENDANT RETRIEVER TOWING'S FED. R. CIV. P. 12(b)(6)'s MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED on:

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- ☒ by first class mail, postage prepaid.
- ☐ by hand delivery.
- ☐ by facsimile transmission.
- ☐ by facsimile transmission and first class mail, postage prepaid.
- ☐ by electronic transmission.
- ☐ by electronic transmission and first class mail, postage prepaid.

DATED: February 21, 2018.

s/ Matthew D. Lowe  
Matthew D. Lowe, OSB # 003093  
Of Attorneys for Retriever Towing